71-1507

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In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1971

No.

In the Matter of

M. LEE MONROE, individually and doing business as North Area Refuse Company, a sole proprietorship, *Petitioner*

vs.

JAMES E. CUSSEN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner M. Lee Monroe, Bankrupt-Appellant below, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment and opinion of that Court entered on February 25, 1972, affirming

the Judgment of the United States District Court for the Eastern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals is appended hereto as Appendix A. The opinion of the United States District Court for the Eastern District of California is appended hereto as Appendix B.

JURISDICTION

On February 3, 1972, the United States Court of Appeals for the Ninth Circuit, one Justice dissenting, affirmed the judgment of the United States District Court for the Eastern District of California denying appellant-bankrupt's Petition for Review and affirming the Referee in Bankruptcy's Order denying petitioner a discharge in bankruptcy. A petition for rehearing in the Ninth Circuit was denied on February 25, 1972, one Justice voting for a re-hearing. The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1254(1) and Title 11, United States Code, Section 47.

QUESTIONS PRESENTED

1. Whether appellant-bankrupt, petitioner herein, was denied a fair and impartial hearing on her Petition for Reconsideration of the Referee in Bank-

ruptcy's Order that she was deemed to have waived her right of discharge under Section 14(e) of the Bankruptcy Act (11 U.S.C.A. 32), said Order having been made on a prior expression of pre-judgment of her communicated by the Referee to the District Judge? and,

2. Do the concepts of due process under the Fourteenth Amendment permit a trier of fact to weigh the credibility of a witness and resolve any conflict in her testimony when there has been, prior to the hearing, a pre-judgment of the witness expressed by the trier of fact?

STATUTORY PROVISIONS INVOLVED

1. Bankruptcy Act, Sec. 14(e), 11 U.S.C.A. 32, provides in pertinent part:

> ". . . if the Court finds after hearing upon notice that the bankrupt has failed without sufficient excuse to appear and submit himself to examination at the first meeting of creditors or at any meeting specially called for his examination, he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect."

2. General Orders in Bankruptcy, Order No. 47 (Reports of Referees and Special Masters), provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth in his findings of fact and conclusions of law and the judge shall accept his findings of fact unless clearly erroneous. The

judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

STATEMENT OF THE CASE

After the hearing on the petition for reconsideration, bankrupt's counsel, for the first time discovered that on July 10, 1968, Honorable Robert E. Woodward, the Referee who presided over the hearing on bankrupt's petition for reconsideration of the Order Deeming her to have Waived her Right to a Discharge directed a letter to Honorable Thomas J. MacBride, Chief Judge of the United States District Court for the Eastern District of California, the body of which, inter alia, reads as follows (Bankrupt's Petition for Review, Exhibit "A"):

> "Mrs. Monroe, the owner of the company, has never appeared and, in fact, is in 'hiding' outside of the State . . ."

From the conjecture and surmise of the Referee expressed in said letter, supra, it is patent that as of July 10, 1968, he had a formulated concept concerning bankrupt's failure to appear at the first meeting of creditors and the continued dates thereof. Nothing in the record indicates that the Referee's said state of mind had been dispelled at the time of hearing on bankrupt's Petition for Reconsideration.

It would appear, that in deference to a fair and impartial hearing, the Referee should have, prior to the inception of the hearing on said petition, divulged

the pertinent content of said letter and either disqualified himself to preside over the hearing and/or established to the satisfaction of the bankrupt that a fair and impartial hearing could have been conducted by him despite the statement appearing in said letter. Bankrupt contends, therefore, that in view of the Referee's state of mind elicited in said letter, she did not receive a fair and impartial hearing on her said petition. No motion for disqualification of the Referee to hear said petition was made by bankrupt or an affidavit of merits for disqualification filed prior to or at the time of the hearing on said petition, for the reason that the copy of the subject letter was not discovered until after the hearing had been concluded. In this connection, though the copy of said letter was on file in the subject bankruptcy proceeding, it was, however, contained in a separate folder among loose leaf materials.

REASONS FOR ALLOWING THE WRIT

1. The majority of the Court for the Ninth Circuit, by affirming the judgment of the District Court has, in effect, denied petitioner due process of law under the Fourteenth Amendment. Trial by an impartial tribunal, at whatever level, is one of the most revered attributes of our judicial process.

Both petitioner and her counsel concur with the concern of the dissenting Justice, Honorable Walter Ely of the Ninth Circuit, that the majority Court ignores a disturbing consideration, namely, the pre-

judgment by the Referee in Bankruptcy of bankrupt's case prior to the hearing on re-consideration and the discovery thereof after it was too late to complain in the District Court, thereby permitting the bankrupt to retain the lasting impression that her rights were not initially resolved by an impartial tribunal.

Since the case of *Tumey v. Ohio,* 273 U.S. 510 (1927), this Court has been zealous of maintaining and preserving fair and impartial trials in our Courts. In expounding this concept, the Court states:

> "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law".

Again, iterating for fair and impartial trials, the Court in *In re Murchison,* 349 U.S. 133 (1955) held that a Judge could not cite a witness for contempt committed before him in his capacity as a "one-man grand jury" and then preside as the trial court judge in the contempt proceeding against the accused. In this case petitioner was a witness before such a "judge-grand jury" investigating the bribery of Detroit policemen. His answers persuaded the Judge that he had committed perjury. Thereupon the Judge ordered petitioner to appear and show cause why he should not be punished for criminal contempt. The Supreme Court of Michigan upheld the conviction. Certiorari was granted by the Supreme Court. *(In re Murchison,* 348 U.S. 984 (1955)). Justice Black, speaking for the Court, said:

> "A single 'judge-grand jury' . . . cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."

This "interest" of the trial judge in the conviction was held to violate petitioner's right to a fair and impartial trial under the Fourteenth Amendment.

Pre-judgment by the trier of fact of the case is expounded *In the Adoption of Richardson* (1967) 251 C.A.2d 222, 59 C.R. 323. A deaf and mute husband and deaf wife, otherwise highly qualified, sought to adopt a normal child given them by an unwed mother. The uncontradicted evidence of many witnesses supported their petition, but the Judge denied it. Prior to the hearing on the petition, the Judge wrote a letter to the bureau of adoptions director stating, inter alia, "I believe that . . . this adoption should be nipped in the bud . . ." The attorney representing the petitioners did not learn of the contents of the Judge's letter until after the hearing of the case. The Court held that the Judge was biased and should have declared his disqualification. At page 232, the Court states:

> "There can be no doubt that the judge was biased and prejudicial against appellants. He wrote the letter of January 27, 1966, to the bureau director before hearing any of the evidene and clearly indicated his state of mind by saying 'I believe that . . . this adoption should be nipped in the bud . . .'"

2. The majority Court of the Ninth Circuit, after finding that the testimony on reconsideration was in some dispute, concludes:

"but the order of the referee on conflicting testimony after weighing the credibility of the witnesses is not clearly erroneous".

It is respectfully submitted that weighing the credibility of petitioner, the appellant-bankrupt below, and resolving any conflict in her testimony by a tribunal which had prejudged said witness prior to the hearing, are acts clearly erroneous under General Orders in Bankruptcy, Order No. 47, under the cases heretofore cited, and is conduct derogatory to the concepts of due process under the Fourteenth Amendment.

CONCLUSION

To uphold and preserve our Judiciary as a body by and through which a fair and impartial trial may be had, mandates that they, who sit in judgment, must conduct trials in the letter and spirit of the concepts of due process guaranteed by the Fourteenth Amendment.

We respectfully urge that the Writ of Certiorari be granted.

Dated, Rancho Cordova, California,
May 15, 1972.

Respectfully submitted,
SIMEON S. REIBIN,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 71-1639

In the Matter of:
M. Lee Monroe, individually, and doing business as North Area Refuse Company, a sole proprietorship, Bankrupt,
Appellant,
vs.
James E. Cussen, Trustee,
Appellee.

[February 3, 1972]

Appeal from the United States District Court
for the Eastern District of California

Before: KOELSCH, ELY and TRASK, Circuit Judges

PER CURIAM:

Appellant appeals from an order of the district court, entered on January 28, 1971, denying bankrupt's Petition for Review and affirming the referee's order denying a discharge in bankruptcy. Appellant contends that the district court erred in adopting the

Referee's Finding of Fact 16, in which the referee concluded that ". . . the failure of the bankrupt to appear at the first meeting of creditors and continuances thereof, was without sufficient excuse."

The finding of the referee should be set aside only if it is clearly erroneous. *Olympic Finance Co. v. Thyret,* 337 F.2d 62 (9th Cir. 1964); *Security-First Nat. Bank of Los Angeles v. Quittner,* 176 F.2d 997 (9th Cir. 1949); Rule 52(a) Fed. R. Civ. P.; General Orders in Bankruptcy, Order No. 47 (Report of Referees and Special Masters). This court has further held:

> "Where a finding of fact by the referee is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous." *Costello v. Fazio,* 256 F.2d 903, 908 (9th Cir. 1958).

Here, the fact of the appellant's failure to appear at the first meeting of creditors and at two continued meetings scheduled because of that failure, is not in dispute. After an order was entered by the referee declaring that the bankrupt had waived her right to a discharge, she did appear at a hearing held on her petition for reconsideration of that order. The testimony then was in some dispute, but the order of the referee on conflicting testimony after weighing the credibility of the witnesses is not clearly erroneous.

The judgment of the trial court affirming the order of the referee dated June 19, 1970, is affirmed.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The majority ignores a disturbing consideration. This is the fact that the Referee conducted the critical hearing after he had already expressed his opinion, privately and in writing, to the effect that the bankrupt was not legally justified in having failed to attend the meetings of the creditors. The bankrupt's counsel represents that he did not learn of the Referee's expression of pre-judgment until after it was too late to complain in the District Court. In these circumstances, it seems to me that the Referee should have either voluntarily excused himself or, at the very least, have advised counsel, in advance, of his opinion concerning the dispositive factual issue, previously set forth in his informally written communication to the district judge. This would have enabled the bankrupt's counsel to request that the hearing be conducted by a different Referee, or, had it been the choice, to agree that the Referee in question was not disqualified. As it is, we permit the bankrupt to retain the lasting impression that her litigation was not initially resolved by an impartial tribunal.

I would reverse.

United States Court of Appeals
For the Ninth Circuit

No. 71-1639

In the matter of
M. Lee Monroe, individually, and doing business as North Area Refuse Company, a sole proprietorship, Bankrupt,
Appellant,

vs.

James E. Cussen, Trustee,
Appellee.

[February 25, 1972]

ORDER

Before: KOELSCH, ELY and TRASK, Circuit Judges

Judges Koelsch and Trask have voted to deny the petition for rehearing. Judge Ely would grant the petition for rehearing.

The petition for rehearing is denied.

Appendix B

In the United States District Court
For the Eastern District of California

In Bankruptcy
No. BK-S 6384-W

In the Matter of
M. Lee Monroe, individually, and doing business as North Area Refuse Company, a sole proprietorship,
Bankrupt.

[January 28, 1972]

ORDER DENYING PETITION FOR REVIEW AND AFFIRMING REFEREE'S ORDER

The above matter came on for hearing December 28, 1970, upon the Petition of M. Lee Monroe to review an Order of the Honorable Robert E. Woodward, Referee in Bankruptcy, entered June 19, 1970. The said Order of the Referee was made upon the Petition of M. Lee Monroe to reconsider the Referee's Order of February 19, 1969, declaring that the bankrupt had waived her right to a discharge and to grant her a discharge. Reconsideration was granted, resulting in the Order of June 19, 1970, holding the bankrupt to have waived her right to a discharge. Petitioner

upon review was represented by her attorney, Simeon S. Reibin and respondent on review, James E. Cussen, trustee, was represented by his attorney, Thomas W. Olson, Jr.

The parties having presented oral argument, the matter was ordered submitted to the Court for its decision on January 11, 1971, and the Court being fully advised, has heretofore on January 25, 1971, announced its decision that the Order of the Referee of June 19, 1970, be affirmed.

Now, therefore, the Court hereby adopts the findings of fact and conclusions of law of the Referee made June 19, 1970, Rule 52(a), Federal Rules of Civil Procedure, and

It is hereby ordered, adjudged and decreed that the Petition of M. Lee Monroe for review of the aforesaid Order of the Referee of June 19, 1970, be denied and,

It is further ordered, adjudged and decreed that the Order of the Referee dated June 19, 1970, be and it hereby is affirmed.

Dated, January 27, 1971.

/s/ Phillip C. Wilkins,
United States District Judge.

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1507

In the Matter of
M. LEE MONROE, individually and
doing business as NORTH AREA
REFUSE COMPANY, a sole
proprietorship, Petitioner

vs.

JAMES E. CUSSEN, Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1507

In the Matter of
M. LEE MONROE, individually and
doing business as NORTH AREA
REFUSE COMPANY, a sole
proprietorship, Petitioner

vs.

JAMES E. CUSSEN, Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

An involuntary petition was filed April 12, 1968 and the bankrupt, petitioner herein, consented to adjudication on April 21, 1968. When the bankrupt did not appear at the first meeting of creditors on May 28, 1968, the Referee continued the meeting to

June 25, 1968, at the request of her counsel. At the continued hearing, counsel produced a letter to support his request for an extended continuance (R 16). Counsel then stated that he had no way of reaching the bankrupt by telephone (R 18); that she hadn't returned the schedules for filing (R 15); hadn't advised him of her address (R 9); and hadn't replied to his letters (R 15). He asked for and was granted permission to withdraw (R 15). The court continued the hearing to August 13, 1968. When the bankrupt telephoned counsel following the meeting of June 25, 1968, he told her that he had withdrawn as her counsel. On August 21, 1968, counsel wrote a letter to the bankrupt (Bankrupt's Exhibit 2) again requesting a medical certificate to show the

bankrupt's inability to appear and stated he would try to "re-open" the first meeting.

The Referee conducted a hearing to determine whether the bankrupt had waived her right to discharge on March 31, 1970 and on June 9, 1970 at which the bankrupt appeared. On June 19, 1970, the Referee made his order that the bankrupt had waived her right to a discharge (CT 11) and a petition for review was filed by the bankrupt on August 31, 1970 (CT 1). On December 20, 1970, Hon. Phillip C. Wilkins, United States District Judge heard oral argument on the petition for review. On January 28, 1971, an order was made denying the petition for review and affirming the Referee's order.

ARGUMENT

The dissenting opinion in the Court of Appeals and petitioner's argument to this court incorrectly assumes that no opportunity was afforded to petitioner to make a complaint to the District Judge about the alleged prejudgment of the Referee. The Referee's letter of July 10, 1968, was attached as an exhibit to the petition for review (Clerk's Transcript, CT 5). But the petition for review simply refers to such letter to show that "conjecture" on the part of the Referee was the sole basis for his finding that the bankrupt had left the State of California just before bankruptcy to avoid the actions of her creditors (CT 12).

The only provision in the Bankruptcy Act relative to disqualification

of a Referee that is applicable here is Section 22b by which the judge may, at any time, for the convenience of the parties or for cause, transfer a case from one Referee to another (Italics added). General Orders in Bankruptcy, Order No. 47 (Petition for writ of certiorari, Page 3), provides that the judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. Petitioner could have made an application to transfer the bankruptcy proceedings to another Referee for a hearing or she could have asked for an evidentiary hearing, de novo, before the District Judge if she believed that the Referee had prejudged the merits of the controversy.

The case, turning upon its own facts, was resolved before the Referee upon conflicting evidence and there are no important questions presented in the petition which would affect the rights of other litigatns.

In view of petitioner's failure to squarely raise the issue of the Referee's prejudgment of the case, or his bias or prejudice in the District Court, this court should not disturb the result reached in the lower courts

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

DATED: June 16, 1972.

LOREN S. DAHL
Member of the Bar of
the Supreme Court
THOMAS W. OLSON, JR.
Counsel for Respondent